

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHRISTOPHER MICHAEL PATTERSON,

 Petitioner,

 v.

 BRIAN WILLIAMS, SR., et al.,

 Respondents.

Case No. 2:20-cv-01267-GMN-NJK

ORDER TO SHOW CAUSE

Pro se Petitioner Christopher Michael Patterson, a Nevada state prisoner, has filed a Petition for Writ of Habeas Corpus (ECF No. 1-1) under 28 U.S.C. § 2254. This habeas matter is before the Court on for initial review under the Rules Governing Section 2254 Cases.¹ For the reasons discussed below, Patterson is ordered to show cause in writing why his federal petition should not be dismissed as time-barred. He must also resolve the filing fee.²

BACKGROUND

Patterson challenges a conviction and sentence imposed by the Eighth Judicial District Court for Clark County, Nevada (“state court”). *State of Nevada v. Patterson*, Case No. C-11-277884-1.³ Following a seven-day trial, a jury found Patterson guilty of kidnapping, sexual assault, battery, open or gross lewdness, and child abuse or neglect. On September 29, 2015, the state court entered a judgment of conviction. Patterson filed a direct appeal. On March 31, 2017, the Nevada Court of Appeals affirmed Patterson’s conviction. *Patterson v. State of Nevada*, Case No. 68917. His conviction became final under federal law on June 29, 2017, when the time expired

¹ All references to a “Habeas Rule” or the “Habeas Rules” in this order identify the Rules Governing Section 2254 Cases in the United States District Courts.

² Patterson also filed a Motion for Appointment of Counsel (ECF No. 1-2). The Court defers consideration of the motion until after he has responded to the order to show cause and resolved the filing fee.

³ The Court takes judicial notice of the online docket records of the Eighth Judicial District Court and Nevada appellate courts. Those docket records may be accessed by the public online at: <https://www.clarkcountycourts.us/Anonymous/default.aspx> and <http://caseinfo.nvsupremecourt.us/public/caseSearch.do>.

1 for him to file a petition for writ of certiorari with the Supreme Court of the United States.

2 On December 19, 2018, Patterson filed a state petition for writ of habeas corpus (“state
3 petition”) seeking post-conviction relief. The state petition was denied as untimely, and Patterson
4 appealed. The Nevada Court of Appeals affirmed the denial of relief, and a remittitur issued in
5 April 2020. *Patterson v. State of Nevada*, Case No. 78687-COA.

6 Patterson represents that he mailed, or handed to a correctional officer for the purpose of
7 mailing, his federal petition on July 3, 2020, initiating this case. (ECF No. 1-1 at 1, 11.)

8 **DISCUSSION**

9 Pursuant to Habeas Rule 4, the assigned judge must examine the habeas petition and order
10 a response unless it “plainly appears” that the petitioner is not entitled to relief. *See Valdez v.*
11 *Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019). This rule allows courts to screen and dismiss
12 petitions that are patently frivolous, vague, conclusory, palpably incredible, false, or plagued by
13 procedural defects. *Boyd v. Thompson*, 147 F.3d 1124, 1128 (9th Cir. 1998); *Hendricks v.*
14 *Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (collecting cases).

15 **I. ORDER TO SHOW CAUSE REGARDING TIME-BAR**

16 The Antiterrorism and Effective Death Penalty Act (“AEDPA”) establishes a one-year
17 limitation period for state prisoners to file a federal habeas petition pursuant to 28 U.S.C. § 2254.
18 The one-year limitation period, *i.e.*, 365 days, begins to run from the latest of four possible
19 triggering dates, with the most common being the date on which the petitioner’s judgment of
20 conviction became final by either the conclusion of direct appellate review or the expiration of the
21 time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). For a Nevada prisoner pursuing a direct
22 appeal, a conviction becomes final when the 90-day period for filing a petition for certiorari in the
23 United States Supreme Court expires after a Nevada appellate court has entered judgment or the
24 Nevada Supreme Court has denied discretionary review. *Harris v. Carter*, 515 F.3d 1051, 1053
25 n.1 (9th Cir. 2008); *Shannon v. Newland*, 410 F.3d 1083, 1086 (9th Cir. 2005); Sup. Ct. R. 13.
26 The AEDPA limitations period is tolled while a “properly filed” state post-conviction proceeding
27 or other collateral review is pending. 28 U.S.C. § 2244(d)(2). However, an untimely state petition
28 is not “properly filed” and thus does not toll the federal statute of limitations. *Pace v. DiGuglielmo*,

1 544 U.S. 408, 417 (2005).

2 Patterson's conviction became final under AEDPA on June 29, 2017, after the Nevada
3 Court of Appeals decided his direct appeal and the time expired for filing a petition for writ of
4 certiorari with the United States Supreme Court.⁴ The AEDPA statute of limitations began running
5 the following day. Absent another basis for tolling or delayed accrual, the AEDPA deadline
6 expired 365 days later on June 29, 2018. Although Patterson filed the state petition on December
7 19, 2018, it was filed nearly six months after the expiration of the AEDPA limitations period and
8 thus could not have tolled an already expired deadline. *See Jiminez v. Rice*, 276 F.3d 478, 482
9 (9th Cir. 2001).

10 Even if the state petition had been filed before the AEDPA statute of limitations expired,
11 however, it would not have tolled the federal deadline because the state petition was untimely and
12 the state court and denied as such. Because the state petition was not timely under Nevada law, it
13 was not "properly filed" for the purposes of tolling the AEDPA deadline. *See Pace*, 544 U.S. at
14 417. Therefore, without another basis for tolling or delayed accrual, the AEDPA deadline expired
15 on June 29, 2018, and Patterson's federal petition, filed over two years later, is untimely on its
16 face. Accordingly, Patterson must show cause why his petition should not be dismissed with
17 prejudice as time-barred under § 2244(d).

18 Patterson is informed that the one-year limitation period may be equitably tolled. Equitable
19 tolling is appropriate only if the petitioner can show that: (1) he has been pursuing his rights
20 diligently, and (2) some extraordinary circumstance stood in his way and prevented timely filing.
21 *Holland v. Florida*, 560 U.S. 631, 649 (2010). Equitable tolling is "unavailable in most cases,"
22 *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999), and "the threshold necessary to trigger
23 equitable tolling is very high, lest the exceptions swallow the rule," *Miranda v. Castro*, 292 F.3d
24 1063, 1066 (9th Cir. 2002) (quotation omitted)). The petitioner ultimately has the burden of proof
25 on this "extraordinary exclusion." *Id.* at 1065. He accordingly must demonstrate a causal
26 relationship between the extraordinary circumstance and the lateness of his filing. *E.g., Spitsyn v.*

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28 ⁴ There is no indication that Patterson filed a petition for writ of certiorari.

1 *Moore*, 345 F.3d 796, 799 (9th Cir. 2003); accord *Bryant v. Arizona Att’y General*, 499 F.3d 1056,
2 1061 (9th Cir. 2007).

3 In addition, under certain circumstances, the one-year limitation period may begin running
4 on a later date or may be statutorily tolled. *See* 28 U.S.C. § 2244(d)(1)(B), (C), (D) & (d)(2).

5 If Patterson seeks to avoid application of the limitation period based upon a claim of actual
6 innocence, he must come forward with new reliable evidence tending to establish actual, factual
7 innocence, *i.e.*, tending to establish that no juror acting reasonably would have found him guilty
8 beyond a reasonable doubt. *See McQuiggin v. Perkins*, 569 U.S. 383 (2013); *House v. Bell*, 547
9 U.S. 518 (2006); *Lee v. Lampert*, 653 F.3d 929 (9th Cir. 2011) (en banc). In this regard, “ ‘actual
10 innocence’ means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523
11 U.S. 624, 623 (1998).

12 **II. PATTERSON’S APPLICATION TO PROCEED *IN FORMA PAUPERIS***

13 Turning to the filing fee, any person who is unable to prepay the fees in a civil case may
14 request permission to proceed *in forma pauperis* (“IFP”). 28 U.S.C. § 1915; LSR 1-1, LSR 1-2.
15 Indigent prisoners who do not have the money to pay the five dollar (\$5.00) filing fee for a habeas
16 petition may apply for IFP status. A prisoner’s IFP application must be submitted on the form
17 provided by the court and include specific financial documents. *Id.* The Local Rules of Practice
18 and § 1915 specifically require three items be submitted to this court with a prisoner’s IFP
19 application: (1) a financial certificate signed by an authorized officer of the institution in which he
20 or she is incarcerated, (2) a copy of his or her inmate trust account statement for the six-month
21 period prior to filing, and (3) a signed financial affidavit showing an inability to prepay fees and
22 costs or give security for them. *Id.*

23 Here, Patterson has requested IFP status to waive his filing fee; however, his IFP
24 application is incomplete. He did not submit a financial certificate signed by an authorized officer
25 at the Nevada Department of Corrections or a certified copy of his inmate trust account statement
26 for the six-month period preceding this habeas action. Although Patterson may qualify for IFP
27 status, the Court cannot make that determination because he has not submitted a complete IFP
28 application. Patterson’s IFP application is therefore denied without prejudice and he has 30 days

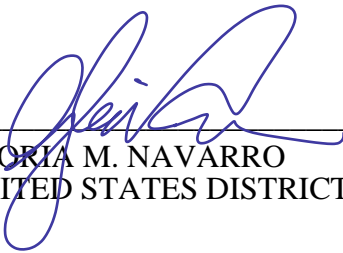
1 to submit a new IFP application or pay the \$5 filing fee.

2 **IT IS THEREFORE ORDERED:**

- 3 1. Petitioner Christopher Michael Patterson must **SHOW CAUSE IN WRITING** by
4 **September 3, 2020**, why this action should not be dismissed as untimely. If Patterson
5 does not timely respond to this order, the petition will be dismissed with prejudice and
6 without further advance notice. If Patterson responds but fails to show with specific,
7 detailed, and competent evidence why the petition should not be dismissed as untimely,
8 the petition will be dismissed with prejudice.
- 9 2. Any assertions of fact Patterson makes in response to this show-cause order must be
10 detailed, must be specific as to time and place, and must be supported by competent
11 evidence. The Court will not consider any assertions of fact that are not specific as to
12 time and place, that are not made pursuant to a declaration under penalty of perjury
13 based upon personal knowledge, and/or that are not supported by competent evidence
14 Patterson filed in the federal record. Patterson must attach copies of all materials upon
15 which he bases his argument that the petition should not be dismissed as untimely.
16 Unsupported assertions of fact will be disregarded.
- 17 3. Patterson's Application to Proceed *In Forma Pauperis* (ECF No. 1) is **DENIED**
18 **without prejudice.**
- 19 4. The Clerk of Court shall RETAIN Patterson's Petition for Writ of Habeas Corpus (ECF
20 No. 1-1), and MAIL Patterson a blank IFP application for incarcerated litigants along
21 with instructions for completing the application.
- 22 5. Patterson must FILE a completed IFP application on or before **September 3, 2020**, and
23 must include: (i) a financial certificate signed by an authorized prison official and
24 Patterson, (ii) a financial affidavit and acknowledgement signed by Patterson, and
25 (iii) a statement of his inmate trust account for the six-month period prior to filing.
26 Alternatively, Patterson must pay the \$5.00 filing fee on or before **September 3, 2020**.
- 27 6. Patterson's failure to comply with this Order by submitting a completed IFP application
28 with the required documents, *or* paying the \$5.00 filing fee, before the **September 3,**

1 **2020** deadline will result in the dismissal of the petition without prejudice and without
2 further advance notice.

3 DATED: July 21, 2020

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7 GLORIA M. NAVARRO
8 UNITED STATES DISTRICT JUDGE
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United States District Court
DISTRICT OF NEVADA

Plaintiff/Petitioner,
v.

Defendant/Respondent,

**APPLICATION TO PROCEED
IN FORMA PAUPERIS
FOR INMATE**

CASE NUMBER:

I, _____, declare that I am the (*check the appropriate box*)

<input type="checkbox"/> Plaintiff (filing 42 U.S.C. § 1983)	<input type="checkbox"/> Movant (filing 28 U.S.C. § 2255 motion)
<input type="checkbox"/> Petitioner (writ of habeas corpus 28 U.S.C. §§ 2254 or 2241)	<input type="checkbox"/> Other <input type="checkbox"/> Defendant/Respondent

in this case. I am unable to prepay the fees of this proceeding or give security because of my poverty. I acknowledge and consent that a portion of any recovery, as directed by the court, shall be paid to the clerk for reimbursement of all fees incurred by me as a result of being granted leave to proceed *in forma pauperis*.

In further support of this application, I answer the following questions:

1. Are you presently employed? ☐ Yes ☐ No
 - a. If the answer is “yes,” state the amount of your salary or wages per month, and give the name and address of your employer. (List gross and net salary.)
 - b. If the answer is “no,” state the date of last employment and the amount of the salary or wages per month which you received.
2. Have you received within the past twelve months any money from any of the following sources?
 - a. Business, profession or other form of self-employment? ☐ Yes ☐ No

- | | | | |
|----|---|------------------------------|-----------------------------|
| b. | Rent payments, interest or dividends? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| c. | Pensions, annuities or life insurance payments? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| d. | Gifts or inheritances? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| e. | Any other sources? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in checking or savings accounts (include any funds in prison accounts, and any funds on deposit with a bank, saving & loan, etc., outside the prison) ?

☐ Yes ☐ No

If the answer is "yes," state the total value and list the location of each account, type of account, and amount or balance in the account. Do not include your account number(s).

4. Do you own or have any interest in any real estate, stocks, bonds, notes, trusts, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

☐ Yes ☐ No

If the answer is "yes," describe the property, its location and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support each month.

6. Do you receive any income from disability, Social Security or any other pension?

☐ Yes ☐ No

If the answer is "yes," describe the source and amount received each month.

7. Have you placed any property, assets or money in the name or custody of anyone else in the last two years?

☐ Yes ☐ No

If the answer is "yes," give the date, describe the property, assets or money, give the name of the person given custody of the item and the reason for the transfer.

ACKNOWLEDGMENT

I, the undersigned, acknowledge that I have read the foregoing and that the information contained therein is true and correct to my own knowledge and belief.

Further, I state that I have not directly or indirectly paid or caused to be paid to any inmate, agent of an inmate, or family member of any inmate a sum of money, favors or anything else for assistance in the preparation of this document or any other document in connection with this action.

Further, I acknowledge that if any of the information included in this motion for leave to proceed *in forma pauperis* is false or misleading, I understand that sanctions may be imposed against me. Those sanctions may include, but are not limited to, the following:

- (1) dismissal of my case with prejudice;
- (2) imposition of monetary sanctions;
- (3) the Nevada Department of Prisons may bring disciplinary proceedings for a violation of MJ-48 of the Code of Penal Discipline, which can include all sanctions authorized under the Code including the loss of good time credits and punitive confinement; and
- (4) perjury charges.

Further, I hereby authorize the United States District Court, District of Nevada, or its representative, to investigate my financial status, and authorize any individual, corporation, or governmental entity to release any such information to the said Court or its representative.

Further, I acknowledge and consent that a portion of any recovery, as directed by the court, shall be paid to the clerk for reimbursement of all fees and costs incurred by me as a result of being granted leave to proceed *in forma pauperis*.

Dated this _____ day of _____, 20__.

(Signature of Applicant)

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.** See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

Signed at _____
(Location)

(Signature)

(Date)

(Inmate Prison Number)

FINANCIAL CERTIFICATE

I request that an authorized officer of the institution in which I am confined, or other designated entity, such as Inmate Services for the Nevada Department of Prisons (NDOC), complete the below Financial Certificate.

I understand that:

(1) if I commence a petition for writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254, the filing fee is \$5.00, and that such fee will have to be paid by me if the court denies my *in forma pauperis* application;

(2) if I commence a civil rights action in federal court pursuant to 42 U.S.C. § 1983, the filing fee is \$400.00 (which includes the \$350 filing fee and a \$50 administrative fee), which I must pay in full; and

(a) if my current account balance (line #1 below) is \$400.00 or more, I will not qualify for *in forma pauperis* status and I must pay the full filing fee of \$400.00 before I will be allowed to proceed with the action;

(b) if I do **NOT** have \$400.00 in my account as reflected on line #1 below, before I will be allowed to proceed with an action I will be required to pay 20% of my average monthly balance (line #2 below), or the average monthly deposits to my account (line #3 below), whichever is greater, and thereafter I must pay installments of 20% of the preceding month's deposits to my account in months that my account balance exceeds \$10.00 (if I am in the custody of the NDOC, I hereby authorize the NDOC to make such deductions from deposits to my account, and I further understand that if I have a prison job, then the 20% of my paycheck that is guaranteed to me as spendable money will be sent to the court for payment of the filing fee); and

(c) I must continue to make installment payments until the \$350.00 filing fee is fully paid, without regard to whether my action is closed or my release from confinement. The \$50 administrative fee will be waived only if I am granted permission to proceed *in forma pauperis*.

Type of action (check one): ☐ civil rights ☐ habeas corpus

INMATE NAME (printed)

SIGNATURE & PRISON NUMBER

1. CURRENT ACCOUNT BALANCE _____

2. AVERAGE MONTHLY BALANCE* _____

3. AVERAGE MONTHLY DEPOSITS* _____

4. FILING FEE (based on #1, #2 or #3, whichever is greater) _____

* for the past six (6) months, from all sources, including amount in any savings account that is in excess of minimum amount that must be maintained

I hereby certify that as of this date, the above financial information is accurate for the above named inmate.

**(Please sign in ink in a
color other than black.)**

AUTHORIZED OFFICER

DATE

TITLE